Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
OCTOBER TERM 1998

MARIE PFAU,
Petitioner,

v.

WILLIAM REED,
IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF THE DEFENSE CONTRACT AUDIT AGENCY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the remedies afforded Petitioner Marie Pfau, a federal employee, for sexual harassment under Title VII of the Civil Rights Act of 1964 preempt Petitioner's remedies for intentional infliction of emotional distress under Texas state law and under the Federal Tort Claims Act, where Petitioner alleged some non-sexual, non-employment-related conduct by her supervisor.

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PETITION FOR WRIT OF CERTIORARI

Marie Pfau, Petitioner, respectfully prays that the Supreme Court of the United States issue a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered on February 8, 1999 and January 14, 1998.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued its original opinion in this case on October 27, 1997. (Appendix C.) After this Court granted a prior petition for writ of certiorari on October 5, 1998, the Fifth Circuit Court of Appeals issued an opinion on remand on February 8, 1999. (Appendix G.)

JURISDICTION

The jurisdiction of this Court to review the Fifth Circuit's judgment by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §§ 2000e-2000e-17

2. Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 et seq. (codified as amended in scattered sections of 5 U.S.C.)

3. Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-80

STATEMENT OF THE CASE

A. Procedural History

This case involves sexual harassment and intentional infliction of emotional distress. The Defense Contract Audit Agency ("DCAA"), Respondent, is a federal agency that audits contracts between the federal government and private contractors. Petitioner Marie Pfau ("Pfau"), who worked as an auditor for DCAA, filed this lawsuit against the DCAA and her first-line supervisor, Pete Gonzales ("Gonzales"), under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2000e-17 (as amended), for wrongful termination on the basis of gender discrimination, quid pro quo and hostile work environment sexual harassment, and retaliation for filing gender and sexual harassment complaints.[1] Pfau also brought claims against DCAA and Gonzales under the Federal Tort Claims Act ("FTCA") and under Texas state law for intentional infliction of emotional distress.

DCAA filed a motion to dismiss Pfau's emotional distress claims, asserting preemption by the Civil Service Reform Act ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111 et

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[1]Pfau sued Gonzales individually and in his official capacity. Pfau's original complaint also named as defendants DCAA (as an entity), the United States Department of Defense, and William J. Perry, in his official capacity as Secretary of Defense. The trial court found that William Reed, as the director of DCAA, was the sole proper defendant to the lawsuit.

seq. (codified as amended in scattered sections of 5 U.S.C.). The district court denied DCAA's motion.

DCAA filed a motion for reconsideration. The trial court reversed its prior decision, granted DCAA's motion for reconsideration, and dismissed Plaintiff's emotional distress claims with prejudice. The trial court held that the CSRA and Title VII preempt claims for intentional infliction of emotional distress brought by a federal employee against the federal government.

DCAA filed a motion for summary judgment regarding Pfau's sexual harassment claims, asserting Pfau failed to establish a prima facie case of respondeat superior. The trial court granted the motion.

The trial court entered final judgment in the case, and Pfau appealed. On October 27, 1997, a panel of the United States Fifth Circuit Court of Appeals, relying on its own precedents, affirmed the trial court, and held that: (1) Title VII preempted Pfau's emotional distress claims[2]; (2) Gonzales was not DCAA's agent within Title VII's definition of "employer"; and (3) Pfau failed to show the element of respondeat superior regarding her sexual harassment claims. The Fifth Circuit denied Pfau's Petition for Panel Rehearing on January 14, 1998.

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[2]Finding the Title VII issue dispositive, the panel specifically did not reach the issue of the preemptive effect, if any, of the CSRA.

On April 14, 1998, Pfau filed her petition for writ of certiorari with this Court, presenting two questions for review. One regarded the preemptive effect, if any, of Title VII on Pfau's claims under the FTCA and Texas state law for intentional infliction of emotional distress. The other question regarded whether Gonzales could be deemed DCAA's agent under Title VII.

On October 5, 1998, this Court granted Pfau's petition for writ of certiorari, vacated the Fifth Circuit's judgment, and remanded the case to the appellate court for further consideration in light of *Burlington Industries v. Ellerth*, 524 U.S. ____, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. ____, 118 S. Ct. 2275 (1998).

On February 8, 1999, the Fifth Circuit issued an opinion vacating the district court's grant of summary judgment on the Title VII agency issue and remanding the case to the district court, but reinstating part of its prior opinion and affirming the district court's dismissal of Pfau's claims for intentional infliction of emotional distress.

B. Statement of Facts

Pfau was subject to repeated instances of sexual and emotional harassment by Gonzales, her first-line supervisor. Gonzales would often make physical contact with Pfau's private areas, including her breasts, buttocks, arms, shoulders, and torso. Gonzales continuously

pressured Pfau for sex, including intercourse and oral sex. Gonzales also inflicted non-sexual conduct upon Pfau, such as harassing telephone calls to her home and constant demands for money.

In December 1992, Pfau instigated a formal complaint of sexual harassment against Gonzales. Gonzales was subject to no disciplinary action regarding the complaint. After Plaintiff filed the complaint, the sexual harassment continued. Gonzales made a sexually suggestive telephone call to Pfau in July 1993. Gonzales remained Pfau's immediate supervisor until DCAA terminated her employment in November 1993.

C. Basis for Federal Jurisdiction in the District Court

The district court had subject matter jurisdiction of this case under: (1) Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §§ 2000e-2000e-17; (2) the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-80; and (3) 28 U.S.C. § 1331 (federal question).

REASON FOR GRANTING THE PETITION

Remedies afforded federal employees for sexual harassment under Title VII of the Civil Rights Act of 1964 do not preempt tort remedies under Texas state law and under the Federal Tort Claims Act where the employee alleges some non-sexual, non-employment-related conduct by her supervisor.

The protections Title VII affords federal government employees to be free from sexual harassment, as well as remedies available to state citizens for tortious, non-sexual conduct, are important matters which should be considered by this Court. This writ of certiorari should be granted because the Fifth Circuit's opinion conflicts with this Court's holding in *Brown v. General Serv. Admin.*, 425 U.S. 820 (1976), in which this Court held that Title VII preempts a state law cause of action brought by a federal employee only when it is "not sufficiently distinct to avoid" preemption. Simply put, the court of appeals erred because Pfau alleged facts to support both her Title VII claim and her state law claims.

In addition, the Fifth Circuit's opinion in this case is contrary to the well-reasoned opinion of the Ninth Circuit in *Brock v. United States*, 64 F.3d 1421 (9th Cir. 1995), in which the court of appeals held that a federal employee's FTCA cause of action against the federal government was not barred by Title VII.

Regarding the issue, the Fifth Circuit in this case wrote:

> We have interpreted the Supreme Court's mandate in *Brown* [*v. General Servs. Admin.*, 425 U.S. 820 (1976)] to mean that, when a complainant against a federal employer relies on the same facts to establish a Title VII claim and a non-Title VII claim, the non-Title VII claim is "not sufficiently distinct to avoid" preemption. *Rowe v. Sullivan*, 967 F.2d 186, 189 (5th Cir. 1992); *see also Jackson v. Widnall*, 99 F.3d 710, 716 (5th Cir. 1996).

Pfau v. Reed, 125 F.3d 927, 932 (5th Cir. 1997).

Based on this premise, the Fifth Circuit held that although "some of the alleged harassment occurred away from the office and after business hours," Title VII still preempted Pfau's FTCA and state law emotional distress claims because, "All of the factual allegations in Pfau's complaint support her claim under Title VII." *Id.* at 933.

The Fifth Circuit went too far by holding that where a plaintiff alleges conduct which would constitute sexual harassment in some respects or even in most respects, then conduct which is not sexual harassment is bootstrapped onto the other. Under the Fifth Circuit's analysis, a federal employee can **never** have both a Title VII claim and a non-Title VII claim because the claims will always stem from the "same facts." Rather than

focusing on whether the "same facts" support both claims, the analysis should focus on whether Pfau alleged facts which could support both claims. *See Brown*, 425 U.S. at 829.

The Fifth Circuit erred in its Title VII holding for two reasons. **First, the Fifth Circuit erred because some conduct alleged by Pfau cannot be sexual harassment because it was not sexual conduct** -- for example, Gonzales demanded money and all-expense-paid vacations from Pfau, and he tormented her with repeated phone calls to her home at night. There is no **sexual content** to this conduct because it does not entail "sexual advances, request[s] for sexual favors, and other verbal or physical conduct of a sexual nature." *See Jones v. Flagship Int'l*, 793 F.2d 714, 719 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); 29 C.F.R. § 1604.11(a) (1992). Unlike other circuits,[3] the Fifth Circuit has held that the conduct alleged by a sexual harassment claimant must be explicitly sexual. *See, e.g., Jones*, 793 F.2d at 719. The Fifth Circuit is inconsistent in its interpretation of Title VII because it will not allow a federal employee, Pfau, who alleges non-sexual conduct, the remedies afforded under the FTCA and state law to compensate for injuries not defined as employment discrimination.

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[3] *See, e.g., Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013-14 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1991); *McKinney v. Dole*, 765 F.2d 1129, 1139 (D.C. Cir. 1985) (all holding that a sexual harassment claimant need not allege conduct explicitly sexual).

Further, some of this conduct cannot be employment-related because it occurred off the DCAA premises, after hours, and was unconnected to Pfau's job; therefore, the conduct did not affect a term, condition, or privilege of Pfau's employment. *See Jones*, 793 F.2d at 719-20; *see also* 29 C.F.R. § 1604.11(a); 42 U.S.C. § 2000e-16(a) (Title VII provision barring discrimination in "personnel actions affecting [federal] employment").

Often the Fifth Circuit has held that non-sexual, non-work-related conduct was not hostile work environment sexual harassment. *See, e.g., Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 193-95 (5th Cir. 1996) (supervisor indicating employee a "Jezebel" not sexual harassment; jury verdict reversed); *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 195-96 (5th Cir. 1991) (unwelcome physical contact with employees not sexual harassment); *Jones*, 793 F.2d at 721 (repeated requests for sexual intercourse not sexual harassment because no tangible job detriment).

In this case, the Fifth Circuit held that Gonzales asking Pfau for money was sexual harassment. If calling an employee a "Jezebel" (*see Weller*), unwanted touching (*see Collins*), and asking for sex (*see Jones*) is not sexual harassment, but asking for money is, there is no consistency in the Fifth Circuit's interpretation of Title VII.[4]

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[4]Later in its opinion, the Fifth Circuit concludes that Gonzales asking a witness in the case, Mary Lou Kirschbaum, to pick up an expensive dinner

By lumping all conduct alleged by Pfau together, the Fifth Circuit has effectively nullified *Brown* and deemed non-sexual, non-work-related conduct as constituting sexual harassment.

Unless this Court is willing to countenance holding employers liable for sexual harassment under Title VII for non-sexual, non-employment-related conduct, then federal employees should be allowed the remedies afforded by the FTCA and by state law. Most important, this Court should establish some consistency in the interpretation of Title VII among the circuits.

Second, the cases the Fifth Circuit cited as authority do not support its conclusion. *Brown* held that a federal employee could not pursue a Title VII claim because he did not file the suit within the required time. This Court's pronouncement that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment," *see Brown*, 425 U.S. at 835, does not relate to whether Title VII preempts remedies afforded to a federal employee under the FTCA and state law for non-employment-related conduct.

The same is true for the other cases cited by the Fifth Circuit. The plaintiff in *Rowe v. Sullivan*, 967 F.2d 186, 189

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tab was not hostile work environment sexual harassment. 125 F.3d at 939 n.8. One is left to wonder why Gonzales asking Pfau for money or to pay for trips is sexual harassment under the Fifth Circuit's reasoning.

(5th Cir. 1992), claimed his suspension was racially motivated, and he filed suit under Title VII and 42 U.S.C. §§ 1981, 1983, and 1985(3). The court held that "the same facts" -- i.e., the suspension -- were "not sufficiently distinct to avoid" preemption by Title VII. *Id.* In *Jackson v. Widnall*, 99 F.3d 710, 715 (5th Cir. 1996), the employee claimed the government's failure to hire him for one job and his discharge from another constituted race discrimination under Title VII and unspecified "constitutional violations." The court held that Title VII preempted these claims "Insofar as Jackson's allegations of constitutional violations arise out of the same facts as his employment discrimination claims. . . ." *Id.* at 716 (citing *Rowe*).

Therefore, the courts in *Rowe* and *Jackson* did not consider whether a federal employee that alleges some non-discriminatory, non-employment-related conduct would have her FTCA or state law claims preempted by Title VII. In fact, the Fifth Circuit refers to no case even remotely similar to this case to make its wide pronouncements regarding the preemptive effect of Title VII.

By contrast, in a case all fours on point, *Brock v. United States*, 64 F.3d 1421 (9th Cir. 1995), the Ninth Circuit held that a federal employee's FTCA cause of action against the federal government was not barred by Title VII. The employee alleged that her immediate supervisor subjected her to unwanted sexual comments, advances, and contact culminating in rape. 64 F.3d at 1422. The Government moved for dismissal of the complaint, arguing

that the employee's FTCA claim was precluded by Title VII. *Id.* at 1422-25. The district court agreed, and dismissed Brock's claim. *Id.* at 1422. The court of appeals reversed, holding that Title VII did not bar the employee's claim. *Id.* at 1423-24.

The Ninth Circuit's analysis of Title VII began with its understanding that it "is the exclusive, preemptive administrative and judicial scheme available for the redress of federal employment discrimination." *Id.* at 1423 (quoting *Brown*, 425 U.S. at 829 (internal punctuation omitted)); *see also* 42 U.S.C. § 2000e-16. The court's analysis did not end here, however:

> Although McKinney's rape and sexual assault of Brock is sufficient to establish a claim of sexual discrimination, **that conduct also constitutes more than sexual discrimination. . . . Title VII is not the exclusive remedy for federal employees who suffer "highly personal" wrongs, such as defamation, harassing phone calls, and physical abuse** . . . .
>
> Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee's sex. In both instances, however, the ability to characterize the ultimate harm suffered as including a lesser offense (*i.e.*, battery or discrimination) does not change the nature or extent of the ultimate harm. **When the harms suffered involve something**

> more than discrimination, the victim can bring a separate claim. . . .
>
> Accordingly, we hold that, because the conduct alleged in Brock's complaint is highly personal violation beyond the meaning of discrimination, the complaint states a claim that is separately actionable under the FTCA.

Id. at 1423, 1424 (citations omitted) (emphasis added); *see also Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 654 (5th Cir. 1994), and *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 265 (5th Cir. 1991) (differentiating Title VII sexual harassment and other harassment resulting in emotional injury).

The holding of *Brock* is all fours on point with the facts of this case, and the court directly held that Title VII did not preclude the federal employee's FTCA claim. A conflict in the circuits exists because the Fifth Circuit summarily passed over the court's reasoning in *Brock*, stating, "We decline to adopt the position taken by the Ninth Circuit in *Brock* because it is inconsistent with the jurisprudence of this circuit." *See Pfau*, 125 F.3d at 933 n.2 (citing *Jackson* and *Rowe*).

Other courts have followed the same reasoning as the court in *Brock*. *See Ray v. Nimmo*, 704 F.2d 1480, 1485 (11th Cir. 1983) (Title VII does not preempt constitutional claim by federal employee); *Brunetti v. Rubin*, 999 F. Supp. 1408, 1410-12 (D. Colo. 1998) ("when the harms

suffered by the federal employee involve more than discrimination, such harms may implicate other distinct rights, such as the right to be free from . . . intentional infliction of emotional distress"); *Stewart v. Thomas*, 538 F. Supp. 891, 893 (D. D.C. 1982) (under *Brown*, Title VII does not subsume or preempt all claims that rely on the same nucleus of operative facts); *Arnold v. United States*, 816 F.2d 1306, 1311 (9th Cir. 1987) (remedy for unconstitutional actions other than employment discrimination, even if arising from the same core of facts, is not barred by Title VII); *Otto v. Heckler*, 781 F.2d 754, 756-57 (9th Cir.) (highly personal violations beyond the meaning of "discrimination" are separately actionable), *amended by* 802 F.2d 337 (9th Cir. 1986); *but see Fusco v. Cohen*, No. 92-CV-1525 (FJS), 1998 U.S. Dist. LEXIS 5038, at *6 (N.D.N.Y April 3, 1998) (citing Fifth Circuit's opinion in *Pfau*, the court held that the plaintiff's state law claim for intentional infliction of emotional distress was preempted by Title VII).

In *Brown*, this Court's inquiry into the legislative history of Title VII focused on whether federal employees should be able to bring parallel actions under both Title VII and other provisions of federal law to redress the same basic injury. Nothing in that history, however, suggests that Congress intended to prevent federal employees from suing their employers and supervisors for common law violations against which Title VII provides no protection at all. Here, Pfau bases her Title VII claim against DCAA and her tort claim against

Gonzales on two distinct and independent rights: the right to be free from discriminatory treatment at one's work site, and the right to be free from emotional injury caused intentionally by another person. *See Brock*, 64 F.3d 1421 1423-24; *Brunetti*, 999 F. Supp. at 1411-12.

This Court should grant this petition for writ of certiorari because the Fifth Circuit has misinterpreted *Brown*, and has adopted reasoning in conflict with its own precedents and those from other circuits. This Court should take this opportunity to clarify any apparent conflict between Title VII, the FTCA, the CSRA, and state law tort remedies for federal employees by adopting the sound reasoning of the Ninth Circuit in *Brock*.

CONCLUSION

This Court should grant this writ of certiorari because the Fifth Circuit's opinion leaves Pfau and others similarly situated without a remedy for their injuries. Therefore, this proceeding involves a question of exceptional importance.

The Fifth Circuit's conclusions regarding Pfau's first issue on appeal (Title VII preemption) and her second issue on appeal (sexual harassment) are flatly contradictory. Regarding the first issue, the Fifth Circuit held that all conduct alleged by Pfau was employment-related. Regarding the second issue, the Fifth Circuit concluded Pfau's sexual harassment claims fail because the conduct

she alleged was not sufficiently employment-related:

> "Pfau's contention that the factual allegations of her first amended complaint 'cannot reasonably be read as conduct constituting *only* employment-related sexual harassment' likewise does not establish the absence of Title VII preemption. **The mere fact that some of the alleged harassment occurred away from the office and after business hours** does not support Pfau's contention that the district court 'misconstrued which factual allegations supported which claims.' All of the factual allegations in Pfau's complaint support her claim under Title VII." 125 F.3d at 933 (emphasis added).

> "Pfau has not produced summary judgment evidence indicating that Gonzales's alleged sexual harassment was so pervasive that the DCAA should have known about it as it was happening. **Pfau's affidavit indicates that much of Gonzales's alleged sexually harassing behavior took place outside the office (e.g., telephone calls at home and visits to her apartment).**" 125 F.3d at 938-39 (emphasis added).

The result of the Fifth Circuit's reasoning is that federal law trumps state law and vice versa, leaving Pfau and others like her without a remedy for their wrongs. Simply put, the Fifth Circuit was taken a remedial law, Title VII, which exists to protect workers against employment discrimination, and has made it a Catch-22 for employees. The holding contravenes the intent of Congress to protect federal workers from job discrimination, and the Texas courts to shield state citizens from mental trauma.

In this case, Pfau sued Gonzales for intentional infliction of emotional distress in both his official and unofficial capacity. The Fifth Circuit's holding is especially troubling because the court affirmed the trial court's dismissal of the claim against Gonzales in his unofficial capacity. The effect of the Fifth Circuit's Title VII preemption analysis is to shield federal employees, like Gonzales, from being held responsible for intentional torts committed outside the course and scope of employment.

As the circuit courts apply this Court's pronouncements in *Faragher* and *Ellerth* to various fact situations, it is critical that this Court continue to direct the courts below to follow congressional intent, not activist agendas. After *Meritor Savs. Bank v. Vinson*, 477 U.S. 57 (1986), some circuits strayed so far from the path laid out by this Court that we moved backward, not forward, in advancing civil rights. This Court can prevent this from happening again by reversing the Fifth Circuit, and setting forth clear principles regarding the interplay among Title VII, the FTCA, the CSRA, and state law.

Marie Pfau, Petitioner, respectfully requests that this Court grant her petition for writ of certiorari.

Respectfully submitted,

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